FILED
JUL 23 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-1867

BERNHARD ROSEE,

Petitioner,

vs.

BOARD OF TRADE OF THE CITY OF CHICAGO, AN ILLINOIS CORPORATION, SIDNEY C. HAMPER, MARTIN H. MILEK, ROY C. LOFTUS, RICHARD ROSE, RAYMOND COMENZO, AND THOMAS HERR, INDIVIDUALLY AND AS MEMBERS OF THE COMMITTEE OF ARBITRATION OF THE BOARD OF TRADE OF THE CITY OF CHICAGO; JULIUS MAYER, WILBERT E. HUGE, ROBERT L. DAVID, THOMAS E. HOSTY, ROBERT C. LIEBENOW, INDIVIDUALLY AND AS PRESIDENT OF THE BOARD OF TRADE OF THE CITY OF CHICAGO; WARREN W. LEBECK, INDIVIDUALLY AND AS SECRETARY OF THE BOARD OF TRADE OF THE CITY OF CHICAGO; JAMES J. COUGHLIN; ALBERT W. KIBBY AND SAM GORDON,

and

JAMES E. BAGGOT, JR., AND DONALD W. MORRISON, INDIVIDUALLY AND d/b/a BAGGOT & MORRISON, AND HARRIS HAYWOOD,

Respondents.

BRIEF OF BOARD OF TRADE RESPONDENTS* IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

KIRKLAND & ELLIS
200 East Randolph Drive
Chicago, Illinois 60601
(312) 861-2000

JOHN E. ANGLE
JOHN H. STASSEN
Attorneys for Board of Trade Respondents

* Board of Trade of the City of Chicago; Sidney C. Hamper, Martin H. Milek (Deceased), Roy C. Loftus, Richard Rose, Raymond Comenzo, and Thomas Herr, individually and as members of the Committee of Arbitration of the Board of Trade of the City of Chicago; Julius Mayer, Wilbert E. Huge (Deceased); Robert L. David; Thomas E. Hosty (Deceased); Robert C. Liebenow, individually and as President of the Board of Trade of the City of Chicago; Warren W. Lebeck, individually and as Secretary of the Board of Trade of the City of Chicago; and James J. Coughlin.

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

INDEX.

	PAGE
STATEMENT	1
Jurisdiction	2
Questions Presented for Review	3
Constitutional Provision Involved	4
Statement of the Case	5
Findings by the Trial Judge	7
Findings by the Appellate Court	8
ADDITIONAL REASONS FOR DENYING THE PETITION	8
CONCLUSION	9

TABLE OF AUTHORITIES.

Cases.

Black v. Cutter Laboratories, 351 U.S. 292 (1956) 9

Case & Co. v. Board of Trade of the City of Chicago, 523 F.2d 555 (7th Cir. 1975) 9

Lagorio v. Board of Trade of the City of Chicago, 529 F.2d 1290 (7th Cir. 1976), cert. denied, 426 U.S. 950 (1976) 9

Rosee v. Board of Trade of the City of Chicago, 311 F.2d 524 (7th Cir. 1963), cert. denied, 374 U.S. 806 (1963) 2, 3, 4

Rosee v. Board of Trade of the City of Chicago, No. 63 C 1348 (N.D. Ill. 1966), aff'd, U.S. Ct. of Appeals (7th Cir.), Nos. 15886 and 16373, cert. denied, 393 U.S. 1055 (1969), rehearing denied, 393 U.S. 1124 (1969) 2

Rosee v. Board of Trade of the City of Chicago, 43 Ill. App.3d 203 (1st Dis. 1976), appeal denied, ... Ill.2d ..... (1977) 2, 3, 4

Rosee v. Bergland, Civil No. 76-1721, U.S. Dis. Ct. (D.C.), dismissed April 26, 1977 2

Ryan v. Cudahy, 157 Ill. 108 (1895) 9

Smith v. Smith, 28 Ill. 56 (1862) 9

Wechsler v. Gidwitz, 250 Ill.App. 136 (1928) 9

Statutes.

7 U.S.C., §§ 1-21 4

28 U.S.C., §§ 1254, 1257 2

Ill. Rev. Stat., Ch. 110, §§ 41, 72 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-1867

BERNHARD ROSEE,

Petitioner,

vs.

BOARD OF TRADE OF THE CITY OF CHICAGO, AN ILLINOIS CORPORATION, SIDNEY C. HAMPER, MARTIN H. MILEK, ROY C. LOFTUS, RICHARD ROSE, RAYMOND COMENZO, AND THOMAS HERR, INDIVIDUALLY AND AS MEMBERS OF THE COMMITTEE OF ARBITRATION OF THE BOARD OF TRADE OF THE CITY OF CHICAGO; JULIUS MAYER, WILBERT E. HUGE, ROBERT L. DAVID, THOMAS E. HOSTY, ROBERT C. LIEBENOW, INDIVIDUALLY AND AS PRESIDENT OF THE BOARD OF TRADE OF THE CITY OF CHICAGO; WARREN W. LEBECK, INDIVIDUALLY AND AS SECRETARY OF THE BOARD OF TRADE OF THE CITY OF CHICAGO; JAMES J. COUGHLIN; ALBERT W. KIBBY AND SAM GORDON,

and

JAMES E. BAGGOT, JR., AND DONALD W. MORRISON, INDIVIDUALLY AND d/b/a BAGGOT & MORRISON, AND HARRIS HAYWOOD,

Respondents.

BRIEF OF BOARD OF TRADE RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT

This case is essentially an accounting dispute between a professional commodity trader (Bernhard Rosee) and his brokerage firm (Baggot & Morrison) which Rosee has attempted over the years to transform into a *cause celebre*. The dispute arose 18 years ago when Rosee and Donald Morrison, through arbitration at the Chicago Board of Trade, sought to resolve questions concerning a trading debit. Despite the dramatics which

Rosee has employed, this action is at heart a routine controversy over whether a debt exists.

Notwithstanding this case's basically mundane nature, it has, in the course of 17 years and in various trappings, been before the Superior and Circuit Courts of Cook County, Illinois, the United States District Court for the Northern District of Illinois (twice), the United States Court of Appeals for the Seventh Circuit (twice), the Appellate Court of Illinois, the Illinois Supreme Court, and, on two occasions, this Court (on petitions for certiorari, both of which were denied).[1]

It is now before this Court a third time. We respectfully submit that this latest petition for writ of certiorari is without merit and should be denied, as were Rosee's previous petitions to this Court.

Jurisdiction

Rosee states in his Petition (page 2) that the "jurisdiction of this Court is involved [sic] pursuant to 28 U.S.C. Sec. 1254." Section 1254 is inapplicable, however. It relates solely to review of cases in the Federal courts of appeals. We must assume that Rosee intended to invoke section 1257 of Title 28 ("State

1. See, *e.g.*, *Rosee* v. *Board of Trade of the City of Chicago*, 311 F.2d 524 (7th Cir. 1963), *cert. denied*, 374 U.S. 806 (1963); *Rosee* v. *Board of Trade of the City of Chicago*, No. 63 C 1348 (N.D. Ill. 1966), *aff'd*, U.S. Ct. of Appeals (7th Cir.), Nos. 15886 and 16373, *cert. denied*, 393 U.S. 1055 (1969), *rehearing denied*, 393 U.S. 1124 (1969); *Rosee* v. *Board of Trade of the City of Chicago*, 43 Ill.App.3d 203 (1st Dist. 1976), *appeal denied*, ... Ill.2d ..... (1977). In addition, the matter has been reviewed by both the Commodity Exchange Commission and its successor, the Commodity Futures Trading Commission. A further extension of this cause, a 1976 suit brought by Rosee in the United States District Court for the District of Columbia, was dismissed on April 26, 1977 on grounds of *res judicata* and collateral estoppel, the Court concluding, *inter alia*, that "Mr. Rosee has had his day in Court." Memo. Order, p. 5, *Rosee* v. *Bergland*, Civil No. 76-1721. (Indeed, he has had 17 years in every conceivable court and before every conceivable administrative agency.) Rosee has appealed, and the matter is currently pending before the United States Court of Appeals (D.C.Cir.).

courts; appeal; certiorari"), which provides for review by writ of certiorari of "final judgments or decrees rendered by the highest court of a State in which a decision could be had" where, *inter alia*, "any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States." Yet Rosee, on page 1 of his Petition, prays for review of the judgment of the Appellate Court of Illinois, and not the order of Illinois Supreme Court denying his petition for review by that court.[2]

Questions Presented for Review

Rosee's statement of the questions presented for review (Petition, page 2) assumes as fact several of the very matters which have been decided against him. First, contrary to his statement, he was not compelled to arbitrate, and the arbitration proceeding was not mandatory. *Rosee* v. *Board of Trade of the City of Chicago*, 43 Ill.App.3d 203, 232-33 (1976) [reprinted in Petitioner's Appendix (hereafter App.), pp. 38a-39a]; see also *Rosee* v. *Board of Trade of the City of Chicago*, 311 F.2d 524, 525-26 (7th Cir. 1963), *cert denied*, 374 U.S. 806 (1963). Second, contrary to his statement, the arbitration proceedings did not fail to provide "fundamental procedural safeguards and rights." *Rosee*, 43 Ill.App.3d at 238 (App., p. 47a); see also *Rosee*, 311 F.2d at 528, 529.

Additionally, Rosee asserts that he was precluded from litigating his claims in a court of competent jurisdiction. This asser-

2. Rosee refers in his Petition on page 2 under the heading "Jurisdiction" to the order of the Supreme Court of Illinois "denying leave to appeal from the Appellate Court of Illinois."

Rosee's petition to the Illinois Supreme Court, however, was for "appeal as a matter of right" or, *in the alternative*, "leave to appeal." In denying Rosee's petition, the Illinois Supreme Court necessarily concluded that Rosee's petition did not present a question under the United States or Illinois Constitutions that "arises for the first time in and as a result of the action of the Appellate Court." Ill. Const., art. VI, § 4(c); Rule 317, S. Ct. of Ill.

tion is simply ridiculous, since for 17 years Rosee has been litigating his claims before the full panoply of state and Federal courts. See, *e.g.*, Note 1, *supra*.

Furthermore, Rosee asserts that the Chicago Board of Trade "has virtual total economic life and death control over commodity trading." This assertion is likewise ridiculous. See, *e.g.*, the Commodity Exchange Act, 7 U.S.C. §§ 1-21.

Lastly, Rosee asserts, without clarification, that the Appellate Court of Illinois "set aside the decision of the trial court." The fact is, however, that the Appellate Court, with regard to the Board of Trade Respondents herein, *affirmed* the judgment of the trial court. *Rosee*, 43 Ill.App.3d at 239 (App., pp. 49a-50a).

Shorn of all these misstatements, the question which Rosee presents to the Court for review would appear to simply be whether the Appellate Court of Illinois and the Illinois Supreme Court were *wrong* in exercising (or declining to exercise) their constitutional and statutory review powers in a manner unsatisfactory to Rosee. Manifestly, this is not a question which merits review by this Court.

Constitutional Provision Involved

Rosee cites, on page 3 of his Petition, the Fourteenth Amendment as the "Constitutional Provision Involved." The Court should be aware that Rosee has previously invoked the Fourteenth Amendment in connection with this dispute, but without success. *Rosee* v. *Board of Trade of the City of Chicago*, 311 F.2d 524, 525, 528 (7th Cir. 1963), *cert. denied*, 374 U.S. 806 (1963). This particular case, however, was framed and tried as a "conspiracy to defraud" case, not as a "due process" case. See *Rosee*, 43 Ill.App.3d at 212-213 (App., pp. 5a-6a).

Statement of the Case

Rosee's Statement of the Case is incomplete, misleading, false in part, slanted, and contains matters outside the record. For example:

1. Rosee fails to indicate why the Board of Trade Respondents were dismissed by the trial court at the conclusion of Rosee's case (Pet., p. 4).

   The fact is that they were dismissed because Rosee had failed to establish by creditable or competent testimony a *prima facie* case against them. See *Rosee*, 43 Ill.App.3d 238 (App., p. 48a).

2. Rosee fails to indicate why the Appellate Court of Illinois affirmed the judgment of the trial court in favor of the Board of Trade Respondents (Pet., p. 4).

   The fact is that judgment was affirmed because Rosee had totally failed to meet his burden of proof. In the opinion of the Appellate Court, none of Rosee's allegations were supported by the evidence. *Rosee*, 43 Ill. App.3d 239 (App., pp. 49a-50a).

3. Rosee speaks of his "nineteen-year fight." (Pet., p. 4.)

   It should be noted that not once in these "nineteen years" has any tribunal found the Board of Trade Respondents guilty of any wrongdoing whatsoever.

4. Rosee states as fact that a conspiracy was formed to silence him (Pet., p. 5).

   There is absolutely no evidence in the record of this case to support this charge.

5. Rosee states as fact that Baggot and Morrison systematically cheated and defrauded him and furnished false and manipulated records to him (Pet., pp. 5 and 6).

   After an exhaustive review of the record, however, the Appellate Court of Illinois concluded otherwise. *Rosee*, 43 Ill.App.3d at 248 (App., pp. 64a).

6. Rosee insists that original records relating to his trades were never produced (Pet. p. 6).

   This is simply not true. See, *e.g.*, *Rosee*, 43 Ill.App.3d at 233-35 (App., pp. 39a-43a).

7. Rosee again asserts that Board of Trade Rule 30 provides for mandatory arbitration (Pet., p. 6).

   This, too, is not true. See, *e.g.*, *Rosee*, 43 Ill.App.3d at 232 (App., p. 38a).

8. Rosee rehashes a number of the allegations he has repeatedly made (but has never substantiated) concerning the 1960 arbitration (Pet., pp. 6-8).

   These allegations, however, were definitively reviewed by the Appellate Court of Illinois and simply found to be without any factual basis. *Rosee*, 43 Ill.App.3d at 230-239 (App., pp. 34a-50a).

9. Rosee discusses the failure of "defendants" to produce certain "segregation records." (Pet., pp. 9-12.)

   His reference to "defendants" is misleading; the Board of Trade Respondents are not involved in this aspect of the case. In any event, the Appellate Court fully reviewed Rosee's contentions in this regard and found them deficient. *Rosee*, 43 Ill.App.3d at 245-46 (App., pp. 59a-60a).

10. Rosee asserts that certain "worksheets" were "manufactured" especially for an arbitration hearing (Pet., p. 14).

    This assertion in false. *Rosee*, 43 Ill.App.3d at 242 (App., p. 54a).

11. Rosee refers to proceedings commenced by him under Section 72 of the Illinois Civil Practice Act (Ill. Rev. Stat., Ch. 110, § 72) alleging "newly-discovered evidence" of fraud. In this connection, portions of his

brief currently before the Illinois Appellate Court are reprinted in the Appendix to his Petition (Pet., pp. 14-15).[3]

Rosee fails to point out, however, that these Section 72 proceedings were decided against him by the trial court, and that it is Rosee who has appealed to the Appellate Court. The trial court concluded, on March 4, 1976, that neither Rosee's "newly discovered evidence," nor the other evidence adduced at evidentiary hearings before the court, contained a "scintilla of creditable or competent evidence that the Respondents or any of them conspired or acted in concert with other defendants in this case, with employees of the Federal government, or with any person or persons, to defraud Petitioner, to impair his livelihood, or to do him any wrong whatsoever."

12. Rosee states that the trial court, as recently as May and June of this year, ordered the Board of Trade to produce "certain records which would exonerate petitioner once and for all." (Pet., p. 15.)

    This statement is false. The Board of Trade has no such records, and affidavits to that effect have been filed with the trial court.

Findings by the Trial Judge

Again, on page 15 under the heading "Findings by the Trial Judge," Rosee lumps all the defendants together in a most misleading fashion and fails totally to recognize the fact that the trial judge found in favor of the Board of Trade Respondents, and that the trial judge's comments were not addressed to any of the Board of Trade Respondents.

3. The arguments advanced in Rosee's brief currently before the Illinois Appellate Court have no factual or legal foundation. Accordingly, Respondents have requested that that court impose sanctions on Rosee pursuant to Section 41 of the Illinois Civil Practice Act (Ill. Rev. Stat., Ch. 110, § 41).

Findings by the Appellate Court

Rosee asserts on page 17 that the Appellate Court "disregarded" all of the evidence. To the contrary, it thoroughly and meticulously reviewed and considered all of the evidence, as even a cursory review of the court's lengthy opinion will demonstrate.

ADDITIONAL REASONS FOR DENYING THE PETITION

Rosee's argument for granting his petition is without merit. He purports to find "state action" in the opinion of the Appellate Court itself and his reading of Illinois law. He asserts that the Illinois Appellate Court's decision denied him due process of law, first, by "holding that issues decided by the Arbitration Committee were conclusively resolved and were not subject to contrary determination by the trial court," and second, by substituting "its findings of fact for those of the trial court" (Pet., pp. 18, 29).

Rosee, however, misstates the holding of the Appellate Court. That court expressly recognized that an arbitration award can be overturned if it is obtained by fraudulent means. *Rosee*, 43 Ill.App.3d at 240 (App., p. 51a). The court then proceeded in detail to review the evidence at trial to determine whether the trial court's apparent determination that Morrison had obtained the award by fraudulent means was supported by the record. The Appellate Court concluded that it was not. 43 Ill.App.3d at 248 (App., p. 64a). In making this determination *vis-a-vis* Baggot, Morrison, and Haywood (the court, it should be stressed, affirmed the trial court's judgment *vis-a-vis* the Board of Trade Respondents), the Appellate Court applied the standard for review established by Illinois law. We fail to see how this constitutes a denial of due process.

Furthermore, Rosee tries to create the false impression that the Chicago Board of Trade can do anything it desires and be

immune from judicial inquiry.[4] This is a gross perversion of what the law provides. See, *e.g.*, *Ryan* v. *Cudahy*, 157 Ill. 108, 122-24 (1895); *Case & Co.* v. *Board of Trade of the City of Chicago*, 523 F.2d 555 (7th Cir. 1975); *Lagorio* v. *Board of Trade of the City of Chicago*, 529 F.2d 1290 (7th Cir. 1976), *cert. denied*, 426 U.S. 950 (1976).

Furthermore, Illinois law has always overturned arbitration awards fraudulently obtained (and for other reasons), and Rosee has been allowed to litigate this question for years. See *Rosee*, 43 Ill.App.3d at 240 (App., p. 51a); *Ryan*, 157 Ill. at 119; *Smith* v. *Smith*, 28 Ill. 56, 59 (1862); *Wechsler* v. *Gidwitz*, 250 Ill.App. 136, 141 (1928). In any event, the scope of review of arbitration proceedings is solely a matter of state law and, whatever quantum of review is accorded, no constitutional question is raised. *Black* v. *Cutter Laboratories*, 351 U.S. 292, 298 (1956).

CONCLUSION

Rosee has shown no special and important reasons why a writ of certiorari should issue. This Petition, like his previous petitions, is without merit. Accordingly, the Board of Trade Respondents respectfully urge that Rosee's Petition for writ of certiorari be denied.

Respectfully submitted,

JOHN E. ANGLE
JOHN H. STASSEN
Attorneys for Board of Trade Respondents

Of Counsel:
KIRKLAND & ELLIS
200 East Randolph Drive
Chicago, Illinois 60601
(312) 861-2000

4. A similar argument was advanced by Rosee in the predecessor to this case, and was rejected by the United States Court of Appeals for the 7th Circuit. *Rosee*, 311 F.2d 527-28, *cert. denied*, 374 U.S. 806 (1963).